Sweetwater Crafts, Inc. *and* United Steelworkers of America, AFL–CIO. Case 7–CA–29121

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On November 30, 1989, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sweetwater Crafts, Inc., Manistee, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's finding that Vice President Kelvin Malstrom did not refute the testimony of employee Robke that, in a conversation at Robke's work station, Malstrom threatened to move the plant if a union came in. We agree with the judge that the testimony of Malstrom on which the Respondent relies concerns an earlier conversation with employees about possible expansion by the Respondent, and that Malstrom did not deny on the record making the threat at Robke's work station. In light of our conclusion that the Respondent violated Sec. 8(a)(1) by Kelvin Malstrom's threat to move the plant, we find it unnecessary to pass on the judge's finding that Vice President Jerry Malstrom made a similar threat, since the additional violation would not affect the Order.

Joseph P. Canfield, Esq., for the Petitioner.
Charles L. Hitesman, Esq. (Landman, Latimer, Clink & Robb), of Muskegon, Michigan, for the Respondent.
James Hughes, Sub-District Director, of Manistee, Michigan, for the Intervenor.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On an original charge filed on April 4, 1989, by United Steelworkers of America, AFL–CIO–CLC (the Charging Party and/or the Union), the Regional Director for Region 7 of the National Labor Relations Board issued a complaint on May 11, 1989, which alleged, in substance, that Sweetwater Crafts, Inc. (the Respondent) engaged in conduct which violates Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by: (1) threatening to move its plant if employees selected a union to represent them; (2) soliciting employee grievances with the implied promise to redress them; (3) maintaining a policy that prohibits employees discussing their pay rates with their fellow employees; and (4) by failing and refusing to recall employees Rick Schimke and Mike Robke from layoff because they had engaged in activities on behalf of Charging Party. Respondent filed a timely answer denying it had engaged in the unfair labor practices alleged in the complaint.

The case was heard in Manistee, Michigan, on August 16, 1989. All parties appeared and were afforded full opportunity to participate. At the onset of the hearing, counsel for the General Counsel (the General Counsel) amended the complaint to allege, in the alternative, that Mike Robke was refused recall by Respondent because he engaged in ''protected concerted complaints.'' At the conclusion of the hearing, General Counsel was permitted to further amend the complaint to add an additional violation of Section 8(a)(1) of the Act, and to allege, in the alternative, that Rick Schimke was refused recall because he had engaged in protected concerted activities. On the entire record, after careful consideration of posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Michigan corporation, maintains its principal office and place of business at 100 S. Glocheski Drive, Manistee, Michigan, where it is engaged in the manufacture, sale, and distribution of small fiberglass boat parts. During the 12-month period ending April 7, 1988, its gross revenue exceeded $1 millon, and it shipped products valued in excess of $50,000 to customers located outside the State of Michigan. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent commenced operations in Manistee, Michigan, in February 1987. It is engaged in the manufacture of fiberglass parts for boats, and produces items such as showers, galleys, radar arches, dive platforms, fish tanks, and hatches. Its principal customers are Chris-Craft, with facilities in Swansboro, North Carolina, and Bradenton, Florida, and Four Winns, which is located 50 miles from Manistee in Cadillac, Michigan. Four Winns purchases approximately 75 percent of its manufactured parts, and Chris-Craft purchases the remaining 25 percent. With exception of parts destined for Bradenton, Florida, it accomplishes delivery by using its own trucks.

The Manistee plant consists of some six departments, i.e., mold, laminating, gelling, popping, grinding, and repair. At the time of the hearing, about 12 production employees were utilized. In normal circumstances, such employees are super-

vised by Kelvin Malstrom,[1] vice president of manufacturing; Michael Rood, production manager; and departmental supervisors. Rood testified the departmental supervisors report to him, and he reports directly to Kelvin Malstrom and to Respondent's president Kraig Malstrom.[2]

During July and August 1988, Four Winns sought to cause Respondent to move its operation closer to Cadillac so it could service them better. At about the same time, the Cadillac Chamber of Commerce and dignitaries from Lake City, Michigan, which is located some 15 miles from Cadillac, also encouraged Respondent to locate in their respective cities. After a representative of Lake City visited the plant, and Respondent's officers visited the cities to explore a possible move, Kraig Malstrom testified Colleen Bush, a production employee, asked him if they were considering a move to Lake City. He told her they were entertaining the idea. Malstrom indicated Respondent's employees were aware it was considering alternate sites.

In late August or early September 1988, the Union commenced to distribute literature at the front entrance to Respondent's premises. Thereafter, Steelworkers authorization cards were mailed to employees. Alleged discriminatee Rick Schimke testified he signed a card he had received in the mail on September 20 and mailed it back to the Union. Alleged discriminatee Michael Robke also signed a card at some unstated time during the organization drive. On October 20, the Union filed a petition in Case GR–7–RC–18817. An election was held on November 30, 1988. The Union received 11 votes, 12 votes were cast against it, and 2 ballots were challenged. Objections were filed by the Union, and a hearing on challenged ballots and objections was held on January 19, 1989. Alleged discriminatee Schimke, who had served as the Union's observer at the election, testified in behalf of the Union during the hearing. By Order dated March 10, 1989, the Board adopted the hearing officers report and recommendations on objections and challenged ballots, and directed that the November 30, 1988 election be set aside and that a second election be conducted. James Hughes, the subdistrict director of District 29 of the Steelworkers, testified without contradiction that Respondent indicated during preelection conference that alleged discriminatee Schimke was in layoff status, but when the second election was held on April 5, 1989, Kraig Malstrom refused to permit Schimke to enter the building to vote, claiming his employment had been terminated. The Union received only two votes during the second election, and after it failed to cause objections to be lodged with the Regional Office in timely fashion, the Board certified the results of the election on May 24, 1989.

[1] Due to financial difficulties, Kelvin Malstrom was not actively employed at the time of the hearing.

[2] The complaint alleges, but Respondent denies, that Rood is a statutory supervisor. The record reveals Rood participates in the interview of applicants, prepares productions schedules and makes daily work assignments, assigns overtime work, grants requests for time off, issues warnings to employees, transfers employees from job to job, and imposes discipline on employees. His normal work hours are 5 a.m. to 5 p.m. and he is a salaried employee. He performs hands-on work when needed and exercises independent judgment when deciding when and where he should help out. Departmental supervisors report problems and their needs for extra help to Rood. On the indicated facts, I find Michael Rood is a supervisor within the meaning of Sec. 2(11) of the Act.

B. *The Alleged 8(a)(1) Conduct*

The complaint alleges, and General Counsel contends, that Respondent, through comments made to employees during the organization campaign, by soliciting employee grievances with the implied promise to remedy them, and by maintaining a published rule prohibiting employees from discussing their rate of pay with others, engaged in independent violations of Section 8(a)(1) of the Act. The conduct of respondent officials alleged to be unlawful and the rule alleged to be offensive are discussed below.

1. Conduct of Kelvin Malstrom

The complaint alleges, in substance, that Respondent, through Kelvin Malstrom's conduct, violated Section 8(a)(1) of the Act by: (1) threatening that if it expanded its operations it would not expand in Manistee if employees selected a union to represent them; and (2) threatening to move the Manistee plant if employees selected a union to represent them. The evidence offered with respect to the allegations is set forth below.

Alleged discriminatee Rick Schimke testified that on a date he could not recall, but believed to be in October 1988, he conversed with Kelvin Malstrom at the Salty Dog bar in Manistee. He recalled that Malstrom told him the Company was really doing great and a number of cities were calling them in an attempt to get them to relocate. He testified Malstrom mentioned a few towns, including Cadillac. With respect to Cadillac, he indicated Malstrom said he did not really want to move there because Four Winns was there and he did not want their (employee) rejects.

Kelvin Malstrom admitted that he shot pool and conversed with Schimke and other employees in a bar during September or October 1988. His recollection, however, was that the conversation described by Schimke occurred at the Northside bar rather than at the Salty Dog. He testified some of the employees had not experienced union representation and indicated they discussed the pros and cons of representation touching on subjects such as the bargaining process, conditions under which strikes occurred, and conditions under which lockouts might occur. His recollection of the portion of the conversation described by Schimke was fragmentary; he merely indicated he was sure he stated he opposed a move to Cadillac because he did not want to end up with Four Winns rejects. During cross-examination, Malstrom admitted that he told the employees that, if they were to expand their operations, they would not do it in Manistee if a union were selected by the employees.

General Counsel relies on testimony given by alleged discriminatee Michael Robke to support the plant closure allegation. Robke testified that about a month before the November 30, 1988 election, Kelvin Malstrom appeared at his work station and stated ''if a union were to come into our shop, they were going to pack up and move elsewhere where they didn't have to worry about unions.'' Malstrom did not refute the described Robke testimony when he appeared as a witness.

Review of the record causes me to conclude that General Counsel has failed to establish that Respondent violated the Act through comments Kelvin Malstrom may have made to Schimke and others at the Salty Dog or Northside bar. The original charge in this case was filed on April 4, 1989, and,

accordingly, the 10(b) date would be October 4, 1988. Malstrom indicated the conversation may have occurred in September or October, and Schimke was unable to fix the date, but stated he believed it occurred in October. In the circumstances described, I conclude the date of the event was not fixed and a finding of violation is not warranted. Consequently, I recommend that paragraph 8(e) of the complaint be dismissed.

With respect to the remaining allegation, it is clear, and I find, that by threatening to pack up and move the plant elsewhere if the Union came into the shop, Respondent, through Kelvin Malstrom's conduct, violated Section 8(a)(1) of the Act as alleged.

2. Conduct of Jerry Malstrom

Paragraph 8(b) of the complaint alleges, in substance, that in or about October 1988, Jerry Malstrom threatened employees by stating the plant would be moved if they selected a union to represent them.

Alleged discriminatee Robke testified that about a week after Kelvin Malstrom threatened plant closure at his work station, he overheard Jerry Malstrom making a comment to the employee in the pulling department[3] while he was on his way to the washroom. He testified the comment was ''that if a union was to come in there, they were going to pack up and move elsewhere.''

Jerry Malstrom is Respondent's vice president of finance. He testified he could not recall telling employees Respondent would move its plant if the Union came in. He testified he had no specific memory of not telling employees that; that anything said would have been casual and he could not recall casual conversation after almost 2 years. He added he did not think he would make such a comment because he knew you are not supposed to make comments like that.

Noting that Jerry Malstrom failed to unequivocally deny the remark attributed to him by Robke, and the fact that Respondent failed to call the employee the remark was supposedly made to as a witness, I am persuaded Robke's testimony must be credited. Accordingly, I find, as alleged, that Respondent, through Jerry Malstrom's conduct, threatened employees with plant removal if they selected the Union as their bargaining agent and thereby violated Section 8(a)(l) of the Act.

3. Alleged solicitation of grievances

Paragraph 8(c) of the complaint alleges that ''on or about December l, 1988, . . . Respondent . . . solicited employee grievances with the implied promise to redress said grievances.''

The record reveals that immediately after the November 30, 1988 election, employee Colleen Bush told Kraig Malstrom and Michael Rood that now that they had lost the election employees would like to get together and tell them some of their complaints. Malstrom testified that, after he informed Bush they had an open door policy to discuss complaints, Rood went to each department to tell employees they were going to have a meeting to collect complaints and if they had complaints or did not want to be at the meeting, they could write them down on a sheet of paper. While Rood sought to play down his part in the solicitation of complaints, alleged discriminatees Schimke and Robke credibly testified that Rood came to the repair department with a clipboard, put it on their locker, and told them if they had any complaints to write them down and they would try to work them out. Schimke added that Rood told them if someone had already written a complaint down and they agreed with it, they should indicate that by putting a checkmark by it. Kraig Malstrom testified Rood later collected the complaints, excepting those made by lamination department employees, and brought them to him. The employee complaint list consisting of two pages was placed in the record as General Counsel's Exhibit 7. The comments and/or complaints listed ranged from requests for explanation of stated company policies to complaints involving a dental plan, equal pay for job classifications, eye examinations, notice of overtime, face masks, and other work-related matters.

The record reveals a so-called employee involvement meeting was held with employees from each department on the Thursday following the election (December 1, 1988). The complaints placed on the lists collected by Rood were discussed, and some of them were admittedly remedied.[4] Thereafter, on December 7, 1988, the Union filed objections to the election, and the challenged ballots and objections were ultimately decided by the Board as the election had been conducted pursuant to a Stipulation Election Agreement.

General Counsel correctly observes that the Board held in *Electric Hose & Rubber Co.*, 267 NLRB 488, 490 (1983), that an employer who solicits employee grievances and thereafter seeks to rectify them, after an election, while objections to the election are pending, engages in conduct which violates Section 8(a)(1) of the Act.[5]

Here, as in the above-cited case, the representation case proceeding had not been concluded when Respondent engaged in the conduct under discussion. In addition to the fact that the Union was entitled to file objections to the election for a period of 7 days following the election, challenges were determinative as the vote was 11 to 12, with 2 challenged ballots having been cast. In the circumstances described, I find that here, as was the case in *Electric Hose*, supra, Respondent knew or should have known when it solicited employee complaints and sought to rectify them that the final result of the election was to be determined at some future date. Accordingly, I find, as alleged, that by soliciting employee complaints and thereafter holding a meeting with employees to rectify them, Respondent violated Section 8(a)(1) of the Act.

4. The policy prohibiting discussion of wages

Paragraph 8(d) of the complaint alleges that since April 21, 1989, Respondent has unlawfully maintained a company policy that prohibits employees from discussing salaries/pay rates with their fellow employees.

[3] Respondent has no ''pulling'' department, but has a ''popping'' department and a ''gelling'' department.

[4] See minutes of meeting. G.C. Exh. 8.

[5] Respondent supports its contention that its conduct did not violate Sec. 8(a)(1) by citing *Ambox, Inc.*, 357 F.2d 319 (5th Cir. 1966), in which the Fifth Circuit refused to enforce a Board finding in *Ambox, Inc.*, 146 NLRB 1520, 1521 (1964), that an employer violated Sec. 8(a)(1) by announcing various employee benefits at a time when timely objections to an election were pending. Obviously, the later case cited by General Counsel must be considered to be controlling.

Kraig Malstrom testified he prepared the list of company policies, which were placed in evidence as General Counsel's Exhibit 9, during the summer of 1987, and he indicated employees are given a copy when they are hired. With respect to pay of employees, the document states: ''Policy Salary/Pay Rate Confidential Between Fellow Workers.'' Malstrom testified the policy prohibiting discussion of pay rates among employees was promulgated because Respondent grants raises according to merit and it wanted to discourage employees from saying someone received a raise but he or she did not. Malstrom testified employees who have violated the policy were told wages were supposed to be confidential between fellow workers. He claims employees violating the policy have not been issued verbal or written reprimands, have not been disciplined, and no employees have been discharged for violating the policy.

In *Waco, Inc.*, 273 NLRB 746, 748 (1984), the Board held that, in the absence of a legitimate and substantial business justification, an employer violates Section 8(a)(1) of the Act by maintaining a rule which prohibits employees from discussing their own wages among themselves. Here, the only reason given by Respondent for the promulgation and maintenance of its rule was that it utilizes a merit pay system and wished to avoid situations where employees would inquire why they were not making as much as their fellow employees. I find the reason for the policy which was advanced does not constitute a ''legitimate and substantial business justification'' for the policy. Accordingly, I find, as alleged, that, by maintaining a policy which prohibits employees from discussing their wages, Respondent violated Section 8(a)(1) of the Act.

C. *The Refusal to Recall Employees Rick Schimke and Michael Robke*

Respondent effectuated a layoff in December 1988 for economic reasons. Eleven employees were laid off. All but four were eventually recalled. Employees Schimke and Robke were included in the layoff but were not recalled.[6] General Counsel initially contends the alleged discriminatees were not recalled because they had engaged in activities on behalf of and in support of the Union. In the alternative, he contends the alleged discriminatees were not recalled because they engaged in protected concerted activities. Respondent contends it failed to recall both alleged discriminatees for valid work-related reasons. The testimony and evidence offered by the parties in support of their respective contentions is set forth below.

Rick Schimke

Schimke was hired by Respondent in November 1987 after he was interviewed by Kraig Malstrom and Mike Rood. His starting wage was $5.50 per hour. He was initially assigned to work in the grinding department. After 3 months, he was moved to the repair department where he worked at the time he was laid off on December 15, 1988.

As indicated, supra, Schimke signed a union authorization card on November 20, 1988. He then mailed it back to the Union and asked fellow employees if they had signed their cards and sent them to the Union. Thereafter, he was supplied with a jacket which had the Steelworker logo on it, and he testified without contradiction that he wore it to the plant and was observed wearing it by Kraig Malstrom, Kelvin Malstrom, and his supervisor, Mike Rood. Schimke served as the Union's observer at the November election, while Rood served as the Company's observer. The employee testified on behalf of the Union at a hearing on objections and challenged ballots on January 19, 1989.

During the organization campaign and the preelection period, Schimke discussed the union situation with both Kraig and Kelvin Malstrom in a local bar. His version of Kelvin Malstrom's comments during their bar conversation is set forth, supra. With respect to Kraig Malstrom, he testified he approached Respondent's president and commented he had heard that he was taking the union vote very personal and that he was mad. He recalled Malstrom agreed he was mad, and that he then remarked he thought if the Union got in they would be asking for a $3 raise to bring them up to where they were at Century Boat; that they could not talk person-to-person and would have a union man in between them.[7]

Immediately after the November 30 election, Rood met Schimke as he was coming out of the office and informed the employee they would be getting a sheet on what they wanted to change around the Company. Schimke told Rood he only had a few minor things to put down, one being that he would like to get paid every week.

On December 15, 1988, at approximately 2 p.m., Kelvin Malstrom informed Schimke he was to be laid off because Chris-Craft had filed in bankruptcy and Four Winns was having a month or so off during the holiday season.[8] Malstrom then indicated their policy was to lay off the single men and keep the married men because of family reasons. The employee claims Malstrom concluded the conversation by saying the layoff should be short; only 2 to 4 weeks. Schimke testified that, when he left work on the day of his layoff, he was given a jacket with the Sweetwater logo on it by Kraig Malstrom, and that Malstrom commented it was to let him know there was a Santa Claus; that it was not a union bribe.

In early March 1989, Schimke telephoned Respondent's plant to inquire about recall. He testified, when Kraig Malstrom got on the line, he told him he heard they were busy again and that they were hiring people back plus new people. He recalled Kraig replied, ''Yes, we did.'' The employee then stated he would like to know why he was not being called back, and he claims Malstrom replied, ''. . . based on my testimony at that hearing and my attitude toward management.'' Schimke testified he then asked, ''Don't it matter that I worked a whole year and never missed a day, never came in late, and worked all the overtime there was.'' He recalled Malstrom replied, ''No, it don't matter. We got people in your place already.''

Schimke testified he had never received any reprimands for his attitude. He indicated he did have a problem with

[6] In addition to Schimke and Robke, Colleen Bush and _____ Goodspeed were not recalled.

[7] When attempting to fix the date of the described conversation, General Counsel asked when, in relation to the posting of the election date of the election, the conversation occurred. The reporter erroneously referred to Kelvin Malstrom rather than Kraig Malstrom in transcribing counsel's question. The transcript, p. 25, L. 20, is hereby corrected by substituting ''Kraig'' for ''Kelvin.''

[8] Kraig Malstrom testified that prior to December 1988, Chris-Craft had a facility in Holland, Michigan. The Holland entity was the corporation which filed in bankruptcy.

Kraig Malstrom with respect to doing some work. He explained Rood told him about a month after he was transferred to the repair department that he was to go to the grinding department to do a few parts because they were behind. He admitted he told Rood he did not want to do two jobs; that he would like to get paid more money. He indicated Rood to]d him he would have to talk to Kraig Malstrom about that, and that he then went to Kraig and told him, ''If you want me to do two jobs, I need more pay.'' He testified Malstrom told him he did not like his attitude; they were a team; get the heck out and take the day off. Schimke indicated Malstrom's comments caused him to tell Rood he would grind the parts, and he indicated he did go to the grinding department and grind the needed parts.

General Counsel's Exhibit 12 reveals that Schimke received a merit raise of 10 cents bringing him to $6.10 per hour on October 31, 1988. Kelvin Malstrom testified he authorized the raise because Schimke had been there a year and deserved a raise. He indicated a second reason had to do with a need for uniformity among employees performing specific types of work.

When he was called as an adverse witness by General Counsel, Kraig Malstrom admitted a newly hired employee was placed in Respondent's repair department on February 21, 1989. He further indicated that, since that date, approximately 12 new employees have been hired and that 4 of them worked in the repair department.

Respondent defended its decision to not recall Schimke through testimony given by Kraig Malstrom, Kelvin Malstrom, and Mike Rood.

Kraig Malstrom testified that his brother Kelvin was the individual who made the final decisions on recall of laid-off employees. He stated the criteria utilized in determining who would or would not be recalled were ability, job performance, and the availability of positions; that Respondent's policy has not been to recall all employees laid off before hiring new employees; and that seniority is not a consideration. He acknowledged that Schimke telephoned him the first couple of weeks in March to inquire concerning recall. His version of the conversation was that Schimke asked if they were going to call him back and that he responded: ''No, not at this time.'' He indicated Schimke asked him why, and testified his response was ''because he wasn't a team player . . . due to his attitude—his work attitude.'' He recalled that Schimke then asked him if it made any difference that he showed up to work everyday and worked all the overtime necessary, and that he indicated that was considered. Malstrom denied he mentioned the NLRB hearing when he conversed with Schimke. He recalled the conversation concluded with Schimke asking if he was going to bring him back, and with him responding, ''[N]o, not at this time.''

Although Respondent contends Kelvin Malstrom made the final decision that Schimke would not be recalled, Kraig Malstrom testified he recommended that Kelvin not recall the employee. He testified the reasons for his recommendation were basically three in number: because he was not a team player; he would not progress in his work by working on the harder parts like showers and galleys; and because he had narcolepsy, fell asleep on the job, and was a hazard to himself and other employees. Malstrom indicated he first concluded Schimke was not a team player when he refused Rood's request that he perform certain grinding functions shortly after he was transferred to the repair department.[9] He explained the employee's failure to progress was evidenced by his propensity to work on smaller parts which were not needed and his reluctance to work, instead, on harder parts such as galleys and shower stalls. Finally, he claimed the employee's narcolepsy disease exposed him to danger because he worked with power tools which could injure him if he fell asleep, and his sleeping spells presented a danger to other employees as he could conceivably start a fire or accidentally stab an employee if he had him using a utility knife. Although Malstrom denied the Board hearing was discussed when he spoke with Schimke on the telephone, he indicated that, when testifying at the hearing on objections and challenges, Schimke had described the Company jacket he had been given as being light blue when it was actually gray. He indicated the company products are various shades of white, and the employee's inaccurate description of the jacket caused him and Kelvin to form doubts as to Schimke's ability to distinguish between the various off-white colors as required in the repair department.

Although he admitted he had observed Schimke and Robke wearing jackets with a union logo on them, and he admitted he was aware Schimke had served as the Union's observer at the November 30 election, he denied that Schimke's participation in union activities was a factor in Respondent's decision not to recall him from layoff. He testified employees, Bob Smith and Marty _____ wore jackets and were not laid off. He also testified that Joe Raspotnik had testified at the representation hearing and had been recalled from layoff.

During cross-examination, Kraig Malstrom acknowledged that Schimke had notified them 3 or 4 months after he was hired in November 1987, that he had narcolepsy. At the time, the employee gave Kelvin Malstrom a three-page excerpt from a publication which described the disease and its effect on those who had it. Malstrom testified the insubordination involving the refusal to grind parts occurred shortly after Schimke was moved to the repair department after spending about 3 months in the grinding department. With respect to Schimke's refusal to work on harder parts, Malstrom claimed the employee had engaged in that practice since he had been placed in the repair department. Finally, Malstrom indicated his brother Kelvin told him he had given Schimke the October 31 merit raise because he had been with the Company a year.

Michael Rood testified that Kelvin Malstrom asked him to verbally evaluate Schimke and Robke when they were ready to recall employees from layoff. He testified he told Kelvin that Schimke refused to work on the harder parts and he had a habit of falling asleep on the job at least 10 times a week. He indicated he also reported to Kelvin that on one occasion Schimke had taken a drink out of a cup containing resin. Rood stated he recommended that Schimke not be recalled. During cross-examination, Rood testified Schimke commenced his refusal to work on larger parts within a month and a half after he was transferred to the repair department, and that he drank the resin 4 or 5 months before he was laid off.

[9] Kraig Malstrom's version of that situation is substantially the same as Schimke's, which is set forth, supra.

Kelvin Malstrom testified he made the final decision that Schimke would not be recalled after discussing the matter with Bob Smith, his brother Kraig, his father Jerry Malstrom, Don March, and Mike Rood. He testified Schimke was not recalled due to three factors: he had narcolepsy; he had an attitude problem as he was not happy with the money he was making and the working conditions; and the third factor was ability—the fact that he worked on only small parts.

During cross-examination, Kelvin Malstrom testified Schimke complained about wages throughout the time he was employed. Similarly, he indicated the employee had complained about inadequate lighting, a lack of buffers, and insufficient b]ow dryers to fellow employees, Mike Rood, and himself throughout the year he was employed. While Kelvin agreed other employees complained about the same things, he characterized Schimke as a chronic complainer. As indicated, supra, Kelvin Malstrom testified he decided to give Schimke the October 31, 1988 raise because he felt he was entitled to one since he had been there a year, and he wanted to accomplish a balance among employees.

Schimke was recalled briefly as a rebuttal witness. He indicated that when gelling the various parts he worked on he used different shades of white gel which was obtained form 55-gallon barrels or from cups. He claimed that the colors in the barrels as well as the colors in the cups were marked.

Michael Robke

Michael Robke was employed by Respondent from July 1988 until he was laid off together with other employees on December 15, 1988. During the last 3 or 4 months of his employment, he worked in the repair department and reported to Mike Rood.

After the union organization campaign began, Robke signed a Steelworkers authorization card. Thereafter, he was given a jacket with a Steelworkers union logo, and he wore it to work. He testified without contradiction that Kelvin Malstrom and Mike Rood saw him wearing the jacket.

As indicated, supra, the employee testified Kelvin Malstrom appeared at this work station about a month before the November 30 election and stated ''if the Union were to come into our shop, they were going to pack up and move elsewhere where they didn't have to worry about unions.'' Robke claims employees Schimke and Dennis Fisk were ''standing around'' at the time, and he recalled Malstrom turned around and talked to Dennis after making the quoted statement. Malstrom did not deny making the comment when he appeared as a witness.

Robke testified Kelvin Malstrom informed him he was being laid off on December 15, 1988. He described Malstrom's comments as follows:

> He told me I was being laid off at the end of the day, and that the single men were going first, due to that we didn't have families, and that the layoff would be two to four weeks, and we'd be called back on seniority.

Like Schimke, Robke was given a jacket with a Sweetwater patch on it when he left work at the end of the day on December 15.

Robke returned to the plant to inquire about recall 4 or 5 weeks after he was laid off. His description of the event appears at pages 45, 46, and 47 of the transcript and is as follows:

> A. I walked in the plant. Kelvin wasn't around, so Jerry went and got him for me. And when he came out, he looked at me and said, ''What do you want?'' And I asked him—I said, ''Well, I come to see if I—if you were going to call me back from lay-off.''
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> Q. When he said to you, ''What do you want,'' how did he say that; in what manner?
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> A. Like he was mad because I was there.
>
> Q. Okay. So then you said—you answered him, and what did he say after that?
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> A. I—I asked—well, he said he didn't know if he was going to hire me back due to the fact of the union activities in the plant and that they didn't want a union in there. They didn't want the people who did and all the union people were gone and they were satisfied with who they had. And he didn't know if he was going to hire me back because I hung around with Rick Schimke, due to the fact that he was a union advisor or had something to do with the union—
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> Q. What happened—
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> A. —and on the stand.
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> Q. I beg your pardon?
>
> A. Because he was on the stand.
>
> Q. And what happened after that?
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> A. He paused for a moment, and then he said that he would consider me for night shift?
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> Q. And what did you say to that, if anything?
>
> A. I asked him why I had to be punished to be put back on—to be put on night shift, and he said that was so me and him could work eye-to-eye.
>
> Q. Anything else said?
>
> A. Yeah. He asked me if I was saying no to it, and I said that I would take it. And then he said—told me to come back in a week, and he would give me my answer.
>
> Q. Who is Kevin Hook?
>
> A. An employee at Sweetwater.
>
> Q. And did his name come up in the conversation?
>
> A. Yes, it did.
>
> Q. How did it come up?
>
> A. I asked him why he had gotten called before me, because I—I thought we were supposed to get called back by seniority, and he said there was no seniority at the plant.

Robke testified he returned to the plant a week later and again conversed with Kelvin Malstrom in his office. He stated he asked him if he had made his decision, and Malstrom said he was not going to hire him back because he had an attitude problem toward the Company. When he was asked if Malstrom said what the attitude problem was, the employee said complaining about dust masks and rubber gloves. He claims nothing else was said at the time.

Robke testified that about a month prior to the time he was laid off, he asked ''Skip'' Bob Smith, the crew leader in the repair department, if they could get the department some dust masks. He indicated that after Smith promised to get back to him but did not, he discussed the matter with Schimke who advised him to tell Rood the department needed rubber gloves and dust masks. He claims he then asked

Rood if he could get their department some rubber gloves and dust masks, and Rood told him he would get back with him.

Respondent defended its decision to refuse Robke's recall through the testimony of Kraig and Kelvin Malstrom.

Kraig Malstrom's testimony was brief. He indicated he mentioned to Kelvin that Robke was a chronic complainer. While Kraig testified Robke never voiced complaints to him, he claimed Robke was not happy with his job and complained about pay and work conditions. He testified Robke was unable to get along with his work leader, Steve Hulett, when he worked in the mold shop.

Kelvin Malstrom's testimony concerning his meetings with Robke and his reasons for refusing to recall the employee was disjointed and incomplete. He testified that, when Robke first came to the plant to inquire about recall, he had not ruled out the possibility that he would recall the employee, but he was thinking about bringing him back on the night shift. He indicated he worked on the night shift and did not want Robke on the day shift because he felt he would be a disruptive influence.

Moving to his first meeting with Robke, Kelvin Malstrom summarized the meeting rather than recounting what was said. He recalled Robke made mention of the fact that he had hired a new employee and that Robke evinced his feeling that he (Malstrom) had decided no more laid-off employees were coming back. Malstrom testified that after Robke expressed that feeling, he told him his biggest problems were attitude and ability, and that caused Robke to give recourse back on what he felt was valid to be hired back. He recalled that Robke sought to explain his poor attitude by telling him part of the reason for his attitude was that another employee, Colleen Bush, was floating around and being boss and irritating him and his fellow workers. Malstrom indicated that insofar as ability was concerned, Robke's problem was that his speed was marginal. When he was asked if Robke's union activity was discussed during the meeting, he claimed one of the comments Robke came back with right away was a statement that the reason he was not bringing him back was because he was for the Union. Malstrom claims his reply was ''you don't think that I know that I have other union employees out there'' Malstrom said the meeting concluded with him saying he would think over the things and comments Robke had made and he was to come back that week.

After his first meeting with Robke, Malstrom testified he discussed some of the things the employee had said with Rood. He indicated he concluded Robke was not trying to persuade him he deserved to be recalled because his job performance was good, but, instead, he was claiming seniority and his perception that he was better than some employees who were recalled should entitle him to recall.

Kelvin Malstrom's version of his second and final conversation with Robke varies substantially from the version given by the employee. Malstrom claims that as soon as Robke walked into the plant he asked if he would get Eric Ursum, a laminator on the day shift. He claims Robke explained he wanted Eric because he had heard Malstrom had said something and he did not want his friendship in jeopardy with Eric. Malstrom indicated he got Ursum off the floor and the three of them discussed what had irritated Robke and when the situation became hostile he concluded he would be dealing with a problem employee if he brought him back.[10] At some point, Robke asked if he was going to be recalled, and Malstrom told him no.

IV. DISCUSSION AND CONCLUSIONS

The causation test spelled out in *Wright Line*, 251 NLRB 1083 (1980), is to be used to determine whether Rick Schimke and Michael Robke were refused to recall from layoff in violation of the Act. There, the Board stated (at 1089):

> First, we shall require that the General Counsel make prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

A. *Credibility of Witnesses*

Obviously, the credibility issues posed by the conflicting testimony given by the alleged discriminatees and the Malstrom brothers must be resolved before further analysis of the testimony and evidence is accomplished.

With respect to the mid-March telephone conversation described by Schimke and Kraig Malstrom, I, without hesitation, credit the employee's version. Schimke was the most impressive witness who testified during the proceeding and he answered questions without hesitation, did not display a tendency to embellish and appeared to be attempting to state the facts as he recalled them. On the other hand, Kraig Malstrom repeatedly hesitated when he was asked questions and he appeared to be carefully considering the legal import of his responses before he spoke. As indicated, supra, he testified Schimke's testimony during the hearing on challenged ballots and objections to the election was considered when the decision to refuse him recall was made. I am persuaded he indicated such was the case when he spoke with Schimke in mid-March. In sum, I credit Schimke where his testimony conflicts with that given by Respondent's witnesses, including Kraig Malstrom.

Turning to the two recall-related conversations involving Robke and Kelvin Malstrom, I am persuaded Robke's version of the first conversation is more reliable than the version given by Malstrom, with the reservation that I gained the impression Robke was stating conclusions to be reached with respect to comments made by Malstrom concerning Schimke. As indicated, supra, Malstrom made no attempt to describe the complete conversation, and I conclude he erroneously recalled Robke complained of a new hire rather than a laid-off employee with less seniority. Robke's uncontested testimony reveals, and I find, that Malstrom told the employee during the conversation that they did not want the Union; did not want people that did; were satisfied with the people they had; and that he voiced reservations about recalling Robke because he and Schimke were friends.

With respect to the second conversation, the above-mentioned witnesses described, I am compelled to conclude that neither described the complete conversation. Malstrom's recollection of the conversation was clearly faulty, and Robke simply recalled only the portions of the conversation

[10] Malstrom stated several times he could not recall what he had allegedly said to Ursum.

he wanted to recall. I credit the employee's claim that Malstrom eventually told him he was not going to recall him because of his attitude, but do not credit his claim that the attitude problem was described by Malstrom as stemming entirely from his complaints about dust masks and gloves.

B. *General Counsel's Prima Facie Case*

Summarized, the record testimony which I credit, and documentary evidence is as follows: Alleged discriminatees Schimke and Robke were employed by Respondent in November 1987 and July 1988, respectively. Both supported the Union in its 1988 organization drive by signing authorization cards and by wearing jackets with union logos to work where they were observed by Respondent management. Schimke thereafter served as the Union's observer at the November 1988 election, and he subsequently testified as a witness for the Union at the January 19, 1989 hearing on challenged ballots and objections to the election.

Schimke and Robke were laid off together with nine other employees on December 15, 1988. Both were told they had been selected because they were single and both were told they would be recalled in 2 to 4 weeks. Robke was informed recall would be by seniority. The record fails to reveal that either employee had been disciplined for any reason by Respondent prior to the time they were laid off. In fact, Schimke received a merit raise of 10 cents a month-and-a-half before he was laid off.

Four or five weeks after he had been laid off, Robke visited the plant, complained a junior employee had been recalled ahead of him, and asked if he would be recalled. He was informed Respondent did not want a union,; that it did not want people who did; and that it was satisfied with the people it had. Robke, who had previously worked on the day shift, was tentatively offered a job on the night shift, and Kelvin Malstrom informed him the reason was so they could work eye-to-eye. The employee said he would accept the offer, but Malstrom told him to return in a week and he would give him his decision. When Robke returned a week later, he was informed he was not going to be rehired.

In mid-March, Schimke telephoned Kraig Malstrom observed a number of new employees had been hired and asked if he was going to be recalled. Malstrom responded that he was not going to be recalled based on his testimony at the hearing and his attitude toward management.

During the period preceding the November 30 election, Respondent evidenced antiunion animus by threatening to move the plant if employees selected the Union as indicated, supra, and, at the time the alleged discriminatees were refused recall, there existed a possibility that the above-mentioned election would be set aside and a new election would be conducted.

By adducing the evidence described, I find General Counsel has established, prima facie, that Schimke and Robke's participation in protected conduct was a motivating factor in Respondent's decision to refuse them recall after layoff.

C. *The Evidence Offered to Show the Alleged Discriminatees Would Have Been Denied Recall Absent Their Participation in Protected Conduct*

As indicated, supra, Respondent's president, Kraig Malstrom, indicated the criteria utilized to determine whether given employees would be recalled after layoff were ability, job performance, and availability of positions. He, together with his brother Kelvin, claimed seniority is not a consideration. When he was asked if Respondent had refused to recall laid-off employees during previous layoffs, he recalled that one employee had not been recalled immediately after a summer layoff, but the employee had subsequently been rehired some months later.

With specific regard to Schimke, Kraig Malstrom testified he recommended the employee not be recalled because: (l) he was not a team player; (2) he would not progress to harder parts; and, (3) he had narcolepsy and fell asleep on the job. He added that he and Kelvin also discussed the fact that Schimke had described the jacket they had given him at the time of his layoff as blue when it was gray, and that indicated to them he would be unable to distinguish the various shades of white which were used on parts in their repair department. Michael Rood also testified he recommended to Kelvin Malstrom that Schimke not be recalled. He claimed the employee refused to work on harder parts, and fell asleep on the job at least 10 times a week. He also indicated Schimke had taken a drink of resin out of a cup on one occasion.

Kelvin Malstrom was alleged]y the person who made the final decision that Schimke was not to be recalled. His stated reasons for the decision were: (l) he had narcolepsy; (2) he had an attitude problem as he was not happy with the money he was making and the working conditions; and, (3) he lacked ability and would work only on small parts.

I find the reasons assigned by Respondent for its failure to recall Schimke from layoff to be unconvincing for several reasons. First, the record reveals that Respondent's management became aware of the employee's supposed work and health deficiencies early in his employment. Second, with exception of the altercation between the employee, Rood, and Kraig Malstrom over his initial refusal to grind parts as instructed by Rood, the record fails to reveal the employee ever received even as much as an oral warning that he was failing to perform adequately. Third, the employee received a merit raise on October 30, 1988, long after the alleged deficiencies had been noted. Finally, the employee was refused recall only after he had engaged in extensive union activity and, at the time he was refused recall, a possibility existed that the November 30 election would be set aside, and a new second election would be conducted.

In sum, I conclude Kraig Malstrom informed the employee of Respondent's real reasons for refusing him recall during their mid- March 1989 telephone conversation. I find the reasons assigned for the refusal to recall the employee at the hearing are pretexts advanced to mask the unlawful reason for its action. Accordingly, I find Respondent has failed to show it would have refused to recall the employee absent his participation in protected concerted activities. In sum, the record reveals Rick Schimke was refused recall by Respondent because he was a known union adherent and he had testified as a witness for the Union in the representation case. I find, as alleged, that by refusing to recall the employee from layoff for the reasons indicated, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

As indicated, supra, Respondent's assigned reasons for refusing Robke recall were that he chronically complained about the same things Schimke complained about; he con-

gregated with other employees and listened to their complaints and thereby interfered with production; and he failed to produce at a speed which was satisfactory. Kelvin Malstrom indicated he felt Robke instigated employee complaints and was a disruptive influence on other employees.

I conclude the reasons advanced for Respondent's refusal to recall Robke from layoff are not convincing. The record reveals the employee voiced complaints throughout the time he was employed, but absolutely no evidence was offered to show that he ever received any warnings or reprimands for conduct which Respondent now claims was offensive. Moreover, while it is claimed that he did not produce fast enough on occasion, no production records or other reliable documentary evidence was offered to substantiate the claim. Indeed, no specific incident wherein the employee allegedly failed to perform adequately was described. I find Respondent has failed to show it would have refused to recall the employee from layoff in the absence of his participation in protected concerted activities. Accordingly, I find, as alleged, that by refusing to recall Michael Robke from layoff, Respondent violated Section 8(a)(1) and (3) of the Act as alleged.[11]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in conduct which violates Section 8(a)(1) of the Act by threatening employees by telling them it would move its plant if they selected a union to represent them, by soliciting and rectifying employee grievances at a time when a question of representation existed, and by maintaining an unlawful rule or policy which prohibited employees from discussing their rates of pay among themselves.

4. Respondent violated Section 8(a)(1) and (3) of the Act by refusing to recall employees Rick Schimke and Michael Robke from layoff because they joined and supported the union.

5. Respondent violated Section 8(a)(4) of the Act by refusing to recall employee Rick Schimke from layoff because he gave testimony in a Board proceeding.

6. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent refused to recall Michael Robke from layoff in violation of Section 8(a)(1) and (3) of the act, and having found it refused to recall Rick Schimke from layoff in violation of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it be ordered to offer Schimke and Robke immediate and full reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges. It is further recommended that Respondent be required to make the named employees whole for any loss of earnings suffered by them by reason of the unlawful discrimination practiced against them, less interim earnings, with backpay to be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (195), and with interest thereon to be computed in the manner provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that Respondent expunge from its records any reference to the unlawful refusals to recall Schimke and Robke from layoff, and inform them that such will not be used as a basis for further personnel action concerning them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Sweetwater Crafts, Inc., Manistee, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees by telling them it will move its plant if they select a union to represent them.

(b) Soliciting employee grievances and seeking to rectify them at a time when a question of representation exists.

(c) Maintaining a rule or policy which prohibits employees from discussing wages among themselves.

(d) Refusing to recall Rick Schimke, Michael Robke, or other employees from layoff because they join or support United Steelworkers of America, or any other labor organization.

(e) Refusing to recall Rick Schimke, or other employees, from layoff because they have given testimony in a Board proceeding.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Rick Schimke and Michael Robke immediate reinstatement to their former positions of employment or, if their positions are no longer available, to substantially similar positions, without prejudice to their seniority or other rights, and make them whole for the loss they suffered as a result of the discrimination in the manner set forth above in the remedy section of this decision.

(b) Remove from its files reference to the unlawful refusals to recall Rick Schimke and Michael Robke, and notify them in writing that this has been done, and that the evidence of this unlawful activity will not be used as a basis for future actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all records or documents necessary to analyze and determine the amount of backpay owed to Schimke and Robke.

[11] Having found the refusals to recall Schimke and Robke violated Sec. 8(a)(1) and (3), I find it unnecessary to consider General Counsel's claim that Respondent engaged in independent violation of Sec. 8(a)(1) of the Act by refusing the named employees recall.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d)Post at its Manistee, Michigan facility copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e)Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees by telling them we will move our plant if they select a union to represent them.

WE WILL NOT solicit employee grievances and seek to rectify them at a time when a question of representation exists.

WE WILL NOT maintain a rule or policy which prohibits employees from discussing wages among themselves.

WE WILL NOT refuse to recall employees from layoff because they join or support United Steelworkers of America, or any other labor organization.

WE WILL NOT refuse to recall employees from layoff because they have given testimony in a Board proceeding.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Rick Schimke and Michael Robke immediate reinstatement to their former positions of employment or, if their positions are no longer available, to substantially similar positions, without prejudice to their seniority or other rights, and make them whole for the loss they suffered as a result of our discrimination against them.

WE WILL remove from our files reference to the unlawful refusals to recall Rick Schimke and Michael Robke, and notify them in writing that this has been done, and that the evidence of this unlawful activity will not be used as a basis for future actions against them.

SWEETWATER CRAFTS, INC.